Nos. 84-1493 and 84-1509

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, *et al.*,
Respondents.

SEATTLE-FIRST NATIONAL BANK,
Petitioner,
v.
FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
A. The Facts	2
B. The Proceedings Below	5
SUMMARY OF ARGUMENT	9
ARGUMENT	14
I. THE BOARD HAS FAILED TO ARTICULATE A RATIONAL BASIS FOR COMPELLING UNIONS TO GRANT NON-MEMBERS THE RIGHT TO PARTICIPATE IN THE UNION'S AFFILIATION DECISIONMAKING PROCESS	14
II. THE *AMOCO IV* RULE IS CONTRARY TO CONGRESS' CLEARLY EXPRESSED INTENT TO VEST CONTROLS OF UNION DECISIONMAKING IN THE UNION'S MEMBERS AND TO DENY THE LABOR BOARD A ROLE IN REGULATING THE PROCESS OF UNION DECISIONMAKING	36
CONCLUSION	49

TABLE OF AUTHORITIES

CASES: Page

Alto Plastics Manufacturing Co., 136 NLRB 850 (1962) 34
American-Hawaiian Steamship Co., 10 NLRB 1355 (1939) 19
American Range Lines, Inc., 13 NLRB 139 (1939) 9, 21
American Trucking Assns., Inc. v. Atchison T. & S.F. R. Co., 387 U.S. 397 (1967) 15
Amoco Production Co. (I), 220 NLRB 861 (1975) .. 6
Amoco Production Co. (II), 233 NLRB 158 (1977) 6-7
Amoco Production Co. (III), 239 NLRB 1195 (1979) 7
Amoco Production Co. (IV), 262 NLRB 1240 (1982) ..... *passim*
Amoco Production Co. v. NLRB, 613 F.2d 107 (5th Cir. 1980) 7
Aspen Skiing Corp., 143 NLRB 707 (1963) 33
Atchison, T. & S.F. R.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800 (1973) 15
Avco Mfg. Corp., 106 NLRB 1104 (1953) 23
Bear Archery, 223 NLRB 1169 (1976), *enf. denied*, 587 F.2d 812 (6th Cir. 1977) 6
Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978) 9, 14
Bethlehem Steel Co., 86 NLRB 340 (1950) 23
Bill Johnson's Restaurants v. NLRB, 463 U.S. 731 (1983) 15
Brewster Aeronautical Corp., 14 NLRB 1024 (1939) 21
Brightwater Paper Co., 54 NLRB 1102 (1944) 21
Brown v. Hotel & Restaurant Employees, —— U.S. ——, 52 L.W. 5042 (July 2, 1984) 46
Burger Pits, 273 NLRB 127 (1984) 18
Burns Int'l Security Service, Inc., 250 NLRB 959 (1981) 34
Cadillac Automobile Co. of Boston, 90 NLRB 460 (1950) 26
Carroll Contracting, 247 NLRB 890 (1980) 34

TABLE OF AUTHORITIES—Continued

	Page
Celanese Corp., 95 NLRB 664 (1951)	18
Cochran Co., 112 NLRB 1400 (1955)	20
Consolidated Edison Co. v. Labor Board, 305 U.S. 197 (1938)	35
Democratic Party v. Wisconsin, 450 U.S. 107 (1981)	37
Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979)	15
Dresser Industries, 264 NLRB 1088 (1982)	22
East Dayton Tool & Die Co., 190 NLRB 577 (1971)	28
Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147 (1983)	15
Emery Industries, Inc., 148 NLRB 51 (1964)	26
Factory Services Inc., 193 NLRB 722 (1971)	27
Finnegan v. Leu, 456 U.S. 431 (1981)	25, 41
First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981)	15
Foote Brothers Gear Machinery Corp., 14 NLRB 1045 (1939), *enf. denied*, 114 F.2d 611 (7th Cir. 1940)	21
Gate City Optical Co., 175 NLRB 1059 (1969)	27
General Cable Corp., 139 NLRB 1123 (1962)	23
Hamilton Brothers, Inc., 133 NLRB 868 (1961)	34
Hamilton Tool, 190 NLRB 571 (1971)	6, 27, 28
Handy Andy, Inc., 228 NLRB 447 (1977)	34
Harris-Woodson Co., 85 NLRB 1215 (1949), *enf'd* 179 F.2d 730 (4th Cir. 1950)	20, 25
Hershey Chocolate Corp., 121 NLRB 901 (1958)	21
Hotel Properties, Inc., 194 NLRB 815 (1972)	34
Insulfab Plastics, Inc., 274 NLRB 126 (1985)	19, 20
Jasper Seating Co., 231 NLRB 1025 (1977)	6-7
J. H. Day Co., 204 NLRB 863 (1970)	28
Labor Board v. General Motors, 373 U.S. 734 (1963)	39
Labor Board v. Insurance Agents, 361 U.S. 477 (1960)	16
Labor Board v. Metropolitan Ins. Co., 380 U.S. 438 (1965)	15

TABLE OF AUTHORITIES—Continued

	Page
Laystrom Manufacturing Co., 151 NLRB 1482 (1965), *enf'd denied*, 359 F.2d 799 (7th Cir. 1966)	22
Machinists Local v. Labor Board, 362 U.S. 411 (1960)	35
M. A. Norden Co., 159 NLRB 1730 (1966)	27
Missouri Service Comm'n., 87 NLRB 1142 (1949)	33
Motor Vehicle Mfrs. Ass'n. v. State Farm Mut., 463 U.S. 28 (1983)	14-16
National Plastic Products Co., 78 NLRB 699 (1948)	22
Newark Rivet Works, 9 NLRB 498 (1938)	19
NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967)	41, 46
NLRB v. Baptist Hospital Inc., 442 U.S. 773 (1979)	15
NLRB v. Bildisco & Bildisco, —— U.S. ——, 52 L.W. 4270 (Feb. 22, 1984)	15
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)	15
NLRB v. Commercial Letter, Inc., 496 F.2d 35 (1974)	27
NLRB v. Longshoremen, 447 U.S. 490 (1980)	15
NLRB v. Longshoremen, —— U.S. ——, 53 L.W. 4919 (June 27, 1985)	15
NLRB v. Weingarten, 420 U.S. 251 (1975)	17
NLRB v. Yeshiva University, 444 U.S. 672 (1980)	15
North Electric Co., 165 NLRB 942 (1967)	6, 28
Pattern Makers v. NLRB, —— U.S. ——, 53 L.W. 4928 (June 27, 1985)	39, 46
Perco, Inc., 204 NLRB 1036 (1973)	28
Providence Medical Center, 243 NLRB 714 (1979)	6
R.C. Williams & Co., 107 NLRB 933 (1954)	26
Retail Clerks v. N.L.R.B., 373 F.2d 655 (D.C. Cir. 1967)	26
RCA Del Caribe, Inc., 262 NLRB 963 (1982)	22
Rinker Materials Corp., 162 NLRB 1689 (1967)	27

TABLE OF AUTHORITIES—Continued

	Page
Roberts v. United States Jaycees, —— U.S. ——, 52 L.W. 5076 (July 3, 1984)	37-38
Rosario v. Rockefeller, 410 U.S. 752 (1973)	37
Scofield v. NLRB, 394 U.S. 429 (1969)	39
Social Security Board v. Nierotko, 327 U.S. 358 (1946)	9, 16
State Farm v. Department of Transportation, 680 F.2d 206 (D.C. Cir. 1982)	16
State Farm Mutual Auto Ins. Co., 225 NLRB 966 (1976)	35
Steelworkers v. Sadlowski, 457 U.S. 102 (1982)	2, 5, 41
The East Ohio Gas Company, 140 NLRB 1269 (1963)	19
Terrell Machine Co., 173 NLRB 1480 (1964), *enf'd* 427 F.2d 1088 (4th Cir. 1970)	18, 22
Union Carbide and Carbon Corp. v. NLRB, 244 F.2d 672 (6th Cir. 1957)	26
Wald Transfer & Storage Co., 218 NLRB 592 (1975)	22
Waterway Terminals Corp., 120 NLRB 1788 (1958)	26, 27
Whittlesea Checker Taxi, Inc., 237 NLRB 1038 (1978)	33
William B. Tanner Co., 212 NLRB 566 (1974)	30
William J. Burns Int'l. Detective Agency, 138 NLRB 449 (1962)	34
STATUTES:	
Labor-Management Reporting and Disclosure Act of 1959	
§ 101(a)(1), 29 U.S.C. § 411(a)(1)	42
§ 101(a)(2), 29 U.S.C. § 411(a)(2)	42
§ 102, 29 U.S.C. § 412	48
§ 201(d)	48
§ 401(a), 29 U.S.C. § 481(a)	42-43
§ 401(b), 29 U.S.C. § 481(b)	42-43
§ 401(e), 29 U.S.C. § 481(e)	42-43
§ 402, 29 U.S.C. § 402	48

TABLE OF AUTHORITIES—Continued

	Page
National Labor Relations Act, as amended	
§ 8(a) (3), 29 U.S.C. § 158(a) (3)	39
§ 8(a) (5), 29 U.S.C. § 158(a) (5)	18
§ 8(b) (1) (A), 29 U.S.C. § 158(b) (1) (A)	39
§ 8(b) (2), 29 U.S.C. § 158(b) (2)	39
§ 9(a), 29 U.S.C. § 159(a)	18
§ 9(c), 29 U.S.C. § 159(c)	17
MISCELLANEOUS:	
Chitayat, *Trade Union Mergers and Labor Conglomerates* (1979)	17
104 Cong. Rec.	43-44
Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163 (1985)	16
Galenson, *The CIO Challenge to the AFL* (1960)	
H.R. 3020, 80th Cong. 1st Sess. (1947)	40
H.R. Rep. 245, 80th Cong. 1st Sess. (1947)	38, 39, 40
Legislative History of the National Labor Relations Act of 1935	35
Legislative History of the Labor Management Relations Act of 1947 (GPO ed. 1948)	39, 40
Legislation History of the Labor-Management Reporting and Disclosure Act of 1959 (NLRB ed.)	41-48
Leisersen & Slicher, *American Trade Union Democracy* (1959)	17
Note, *Union Affiliation and Collective Bargaining*, 128 U. Pa. L. Rev. 480 (1979)	17
S. 3974, 85th Cong., 2d Sess. (1958)	43
S. 748, 86th Cong., 1st Sess. (1959)	47
S. Rep. 105, 80th Cong. 1st Sess. (1947)	38-39
S. Rep. 187, 86th Cong. 1st Sess. (1959)	43, 48

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BRIEF FOR RESPONDENT FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182

The citations to the opinions below, the basis on which this Court's jurisdiction is invoked and the statutes and regulations involved are set out at pp. 2, 1a-3a of the brief of the National Labor Relations Board ("NLRB Br.").

STATEMENT OF THE CASE

A. The Facts

In 1970, the Firstbank Independent Employees Association ("FIEA" or the "Union") was certified as the exclusive bargaining representative of the employees of the Seattle-First National Bank ("Seattle-First" or the "Employer") working at 170 locations throughout the State of Washington, after a representation election conducted by the National Labor Relations Board ("NLRB" or the "Board"). Pet.App. 29a; Jt.App. 45.[1]

The FIEA Constitution was framed to provide the flexibility to meet changing circumstances and the changing needs and desires of its membership. Amendments to any portion of the Constitution could be "proposed by majority vote of the Executive Council or a Unit" and ratified by the membership. FIEA Constitution, Art. XVIII, Jt.App. 66. The Constitution also provided, in conformity with federal law, for periodic election of union officers, *id.* Art. V(D) and (E), Jt.App. 56-58, and for dues to be established from time to time "by the affirmative vote of two-thirds of the Executive Council and ratified by a majority of the membership . . . ," *id.* Art. X, Jt.App. 61. And while initially only Seattle-First employees (with certain exceptions) were eligible for membership in the Union, "[e]xpansion to include other labor organizations or employees of other banks [could] be accomplished by the affirmative vote of two-thirds of the Executive Council and ratification of whatever amendments to this Constitution may be required." *Id.* Art. IX, Jt.App. 61.

Of the most immediate significance in this case, the FIEA Constitution expressly provided for "affiliation with other labor organizations." *Id.* Art. VIII, Jt.App. 61. An

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[1] "Pet.App." refers to the Appendix to the National Labor Relations Board's Petition For A Writ of Certiorari in No. 84-1493. "Jt.App." refers to the Joint Appendix.

affiliation could take place if recommended by the Union's Executive Council and ratified by a membership vote in which at least 60% of the members voted and a majority favored affiliation. Jt. App. 8.[2]

As the time for the 1977 renegotiation of the Seattle First-FIEA collective bargaining agreement drew near, the Union's Executive Council was concerned, based upon what the Council knew of the Employer's bargaining position, that there might be "rather protracted contract negotiations" requiring "extensive legal assistance . . . [which FIEA was] not in a financial position to sustain." Jt. App. 8. The Executive Council directed the Union's bargaining committee, in conjunction with carrying on the contract negotiations, to "constitute itself a search committee to examine [other] unions for the possibility of affiliation." *Id.* In performing this assignment, the committee "concentrated on . . . looking to see that the structure [of a potential affiliation partner] would be compatible" [with FIEA]; in determining compatibility the committee assigned the "resulting degree of autonomy" the affiliated FIEA would enjoy "a high priority. . . ." Jt.App. 9, 73, 76.

After discussions with several national labor organizations, the Executive Council determined that the Retail Clerks International Union (now the United Food and Commercial Workers ("UFCW")) best met FIEA's criteria and FIEA concluded an affiliation agreement with UFCW. Jt.App. 8-9. The first NLRB decision in this case describes what then ensued:

> The affiliation agreement was unanimously approved by the executive council of FIEA. A notice was mailed to all unit representatives (the equivalent of shop stewards) informing them of meetings to be held throughout the State on January 6, 7, and 8,

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[2] Until 1975, the FIEA Constitution required that to approve an affiliation, two-thirds of the members must vote, and two-thirds of those voting must approve the affiliation. Jt. App. 7.

> 1978. At these meetings the unit representatives were informed of the terms of affiliation, the election procedure, and the standards for voter eligibility. In order to vote an individual had to be either a current member of FIEA or join by January 19 and pay 1 month's dues of $4. The unit representatives were instructed to contact all unit employees and inform them of the pending affiliation vote and specifically to contact nonmembers and explain to them the eligibility standards. Concurrently a letter was sent to all unit employees informing them of the pending election and the eligibility requirements. After this initial meeting other meetings were held at all work locations. These meetings were attended by officials of both FIEA and Clerks and were open to all unit employees. On or about January 17 another letter was sent to all unit employees reiterating the eligibility standards.
>
> On January 20 a notice was sent to all FIEA members informing them that a secret-ballot, affiliation election would be conducted by the Washington State Public Employment Relations Commission (PERC). . . .
>
> PERC mailed the ballots on February 4 to 2,624 members; there were approximately 4,800 employees in the unit. The results were 1,206 votes for affiliation and 774 against. FIEA applied for, and on April 1 was granted, a charter by the Clerks [UFCW]. [Pet. App. 28a-29a.]

After the affiliation vote, FIEA continued to operate out of the same offices, pursuant to the same organizational structure, and, except for normal turnover, with the same officers and unit representatives. Jt.App. 14-16, 46-47. As before, Seattle-First employees constituted FIEA's membership. Jt.App. 46. As a UFCW local union, FIEA, and its members, remained in charge of its own collective bargaining negotiations and of such decisions as whether to go on strike; indeed FIEA continued to be represented by the same bargaining committee

before and after the affiliation. The one difference affiliation has made is to enable FIEA to call on the UFCW for financial and staff assistance which FIEA promptly proceeded to do. Jt.App. 26, 30-31, 47, 79.[3]

From the outset, the Employer opposed and actively campaigned against the affiliation effort. Jt.App. 90-91. In so doing, the Employer insisted that nonmembers of the Union should vote on the question of whether FIEA should affiliate with the UFCW. *Id.*

B. The Proceedings Below

On June 19, 1978, FIEA filed a petition with the NLRB seeking to amend its Board certification to state its new name—"Financial Institution Employees of America, Local 1182, chartered by the Retail Clerks International Union, AFL-CIO." Pet. App. 27a. The NLRB ruled that the affiliated Union is a continuation of the previously-certified representative, stating that the affiliation "does not create a new organization, nor does it result in the dissolution of an already existing organization. . . . ," and on that basis made the certification amendment. Pet. App. 30a.

Despite the Board's ruling, Seattle-First refused to bargain with FIEA. On the Union's resulting unfair labor practice charges, the Board found that the Employer had "refuse[d] to bargain collectively with the representatives of his employees" in violation of § 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(5) ("NLRA" or the "Act"). Pet.App. 34a-42a.[4] Seattle First petitioned for review in the United States Court of Appeals for the Ninth Circuit.

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[3] The UFCW International President must approve a strike to make the strikers eligible for international union strike benefits, but strikes by UFCW local unions can and do occur without such authorization. Jt.App. 30, 168-70. Conversely, "the International executive board cannot force a local union to go on strike." Jt.App. 31.

[4] The Employer sought an unfair labor practice case hearing to introduce new evidence not presented at the certification amend-

While that petition was pending the Board requested a remand of this case for reconsideration. More than two years after the remand, the Board, in the companion case of *Amoco Production Co.*, 262 NLRB 1240 (1982) (*"Amoco IV"*), reversed, by a 3-2 vote, its longstanding position that employees in a bargaining unit represented by a union who are not union members have no more right to vote on affiliation decisions than nonmembers have to participate in the decision of any other union governance question.[5]

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ment hearing. That evidence included petitions, dated April and May 1979, from about 350 employees—a small minority of the nonmembers of the Union—stating that they wished to vote on the affiliation question. Pet.App. 36a. The Board refused to grant the requested hearing because "the new evidence would have no effect on the validity of the affiliation vote." *Id.*

[5] As we show pp. 24-26 *infra*, for years the Board took the position that questions concerning a union's procedures for effecting an affiliation are of no concern to the Board. Thereafter, the Board concluded that the union is required to hold a vote among its members on an affiliation, but that nonmembers are not entitled to vote in that election. That latter rule was first announced in *North Electric Co.*, 165 NLRB 942 (1967), and was adhered to for over a decade. *See, e.g., Hamilton Tool*, 190 NLRB 571 (1971); *Bear Archery*, 223 NLRB 1169 (1976), *enf'd denied*, 587 F.2d *812* (6th Cir. 1977).

In *Jasper Seating Co.*, 231 NLRB 1025 (1977), the Board, in a 3-2 opinion (Members Murphy and Fanning dissenting), for the first time suggested that nonmembers are entitled to vote in affiliation elections, although even that decision was equivocal in that there was no one opinion for the majority, and Member Penello's decisive concurring opinion was "based upon the application of principles different from those applied by my colleagues," *id.* at 1026. *See Providence Medical Center*, 243 NLRB 714, 723 (1979). In the wake of *Jasper Seating*, the Board secured a remand of petitions for review that were pending from its two decisions in *Amoco Production Company*, 220 NLRB 861 (1975) and 233 NLRB 158 (1977) (*Amoco I* and *"Amoco II"*), sustaining an affiliation election in which nonmembers had not voted, and ordering the employer to bargain with the affiliated union (*Amoco I*) and to provide reimbursement to the union of a sum equal to the dues the employer,

The Board applied its newly-announced *Amoco IV* rule to this case as follows:

> The [Employer] argues, *inter alia*, that the affiliation election is invalid because only members of FIEA were permitted to vote. In accordance with our recent decision in *Amoco Production Company*, this contention is correct. . . . Accordingly, the election did not meet minimal due-process standards and the affiliation was improper. The [Employer], therefore, did not violate Section 8(a)(5) when it refused to bargain with Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO. [Pet. App. 47a]

On this basis the Board vacated the amended certification and dismissed the refusal to bargain complaint. The Board, however, did not reverse, or so much as question, its earlier conclusion that the FIEA affiliation with the UFCW did not work a change in the identity of the certified representative.

This case then returned on review to the Ninth Circuit which concluded that "[t]he Board's new rule is . . . neither consistent with the NLRA's purposes nor

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in violation of the collective bargaining agreement, had failed to withhold from employees' wages (*Amoco II*).

On remand, the Board in *Amoco III*, 239 NLRB 1195 (1979), reaffirmed its rule that nonmembers are not entitled to vote in affiliation elections; the Board stated that "[t]o the extent *Jasper* [*Seating*] may be inconsistent with our decision here, it is overruled," 239 NLRB at 1195 n.3. *Amoco III* was in turn vacated by the Fifth Circuit for clarification of the determination that the affiliated union there was a continuation of the preexisting bargaining representative; that court did not reach the issue of nonmember voting. *Amoco Production Co. v. NLRB*, 612 F.2d 107 (5th Cir. 1980). In *Amoco IV*, the majority (Chairman Van de Water, Members Hunter and Jenkins) used the occasion of the remand to overrule the holding of *Amoco III* with respect to nonmember voting and to adopt the rule at issue here.

rational," Pet. App. 23a, and vacated the Board's decision. That court explained:

> The Board's previously-followed . . . procedures adequately protected the critical rights of employees to be represented by a union selected by a majority of employees in the unit while also protecting union members' rights to run their internal affairs free from unnecessary outside intervention. The procedure allowed the Board to require a post-affiliation representation election on a case-by-case basis if a "question concerning representation" arose. Where no question arose because the affiliation resulted in an insubstantial change in the certified bargaining representative, the Board recognized the change as a purely internal matter and amended the certification of the newly-affiliated union without a unit-wide election. It is irrational to discard an effective procedure that neither (1) unnecessarily interferes in internal union affairs, (2) unnecessarily destabilizes the bargaining representative, nor (3) unnecessarily discourages the legitimate decision of independent unions to affiliate, in favor of a new procedure that presents all of those risks. [Pet. App. 20a]

SUMMARY OF ARGUMENT

I. Decisions of the National Labor Relations Board are "judicially reviewable for consistency with the [governing] Act, and for rationality." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978). In this case, particular care is in order in assuring that the Board has met its decisionmaking responsibilities for two reasons. First, this is a situation in which the agency has chosen radically to alter a rule that was settled for many years. Second, this is a situation in which the Board's very authority to act in the area is at issue, and it is settled that "[a]n agency may not finally decide the limits of its statutory power," *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946). Part I(A), pp. 14-17, *infra*.

The Board's decision in *Amoco IV* fails this test of rationality for two independent reasons.

First, the *Amoco IV* rule rests on premises that are mutually inconsistent. The Board holds that when a duly-elected bargaining representative undergoes "organizational changes that are substantial enough to create an entirely different entity," a "statutory question concerning representation" is posed which "can only be determined through the Board's election procedures." NLRB Br. at 16. The Board also holds that "in general . . . affiliations do *not* destroy continuity of representation," NLRB Br. at 16 n.10 (emphasis added), and thus do not raise a "statutory question concerning representation"; this is true because an affiliation does not ordinarily affect the continued identity of the bargaining representative that the employees have chosen, because the fact that a union has affiliated with some other entity "has no probative value concerning the employees' choice of the [union] as their collective bargaining representative," *American Range Lines, Inc.*, 13 NLRB 139, 154 (1939), and because if, in a particular case, an affiliation does lead to a union's loss of majority support, the Board's representation election processes provide a fully adequate

means of response. But notwithstanding that, in the Board's own view, affiliations do not ordinarily raise a question of representation, the *Amoco IV* rule requires that nonmembers be permitted to vote in affiliation referenda in order to protect their "freedom to select a bargaining representative." Pet. App. 55a n.12 (emphasis deleted).

This rationale is internally inconsistent. The premise that a union affiliation decision involves the "select[ion] of] a bargaining representative" is contrary to the Board's own conclusion that an affiliation does not ordinarily involve such a selection because the representative that has already been selected continues to serve in that capacity. And since a Board-conducted representation election will be held when an affiliation does implicate the selection of a bargaining representative, it makes no sense to state, as *Amoco IV* does, that nonmember voting in union-conducted affiliation referenda is necessary to protect the nonmembers' "freedom to select a bargaining representative." Part I(B), pp. 17-31, *infra*.

Nor can Board counsel's alternative defense of the *Amoco IV* rule withstand analysis. The fact that an affiliation may "significantly affect the union's representation of the bargaining unit," NLRB Br. at 22, does not provide a rational basis for permitting employees who are not members of a union to vote on whether that union should affiliate with another entity; if it did, nonmembers would also be entitled to vote on a host of other union decisions that equally affect them, from the election of union officers to the ratification of collective bargaining agreements. Yet the Board itself recognized in *Amoco IV* that nonmembers are not entitled to participate in those decisions. And affiliation votes cannot be distinguished from these other matters on the ground that the other matters do not call for the Board "to put its imprimatur on the union's decision." NLRB Br. at 23 n. 18. An order requiring an employer to bargain with

a union after an affiliation does not place the Board's imprimatur on the affiliation decision any more than an order to bargain after a union's election of officers or an increase in dues would place the Board's imprimatur on those decisions. Indeed, the Board itself has long rejected the theory that, in the guise of assuring the integrity of its bargaining orders, the Board is empowered to impose all manner of requirements on how unions govern themselves. Part I(B), pp. 31-34, *infra*.

The Board's decision here is irrational in a second and more profound sense: the *Amoco IV* rule is inconsistent with the basic purposes of the National Labor Relations Act. The overall aim of the Act is to "encourag[e] the practices and procedure of collective bargaining" and thereby promote "the making of agreements which will stabilize employment conditions and promote fair working standards." That end in turn requires "stability of bargaining relationships." Yet, the *Amoco IV* rule—and the Board's "due process" regulation of union affiliation elections generally—multiplies in a wholly-unthinking way the occasions for disruptions of industrial stability. That rule permits an employer to seize upon perceived (or pretended) defects in a union's procedures for affecting an organizational chage to cease recognizing and bargaining with that union even though the union is a continuation of the organization the employees chose as their bargaining representative; the employees have not themselves sought to oust the union as their representative; and the employer does not even have a good faith doubt based on objective considerations that the union lacks majority support. Part I(C), pp. 34-36, *infra*.

II. Aside from its failure of reasoning, the *Amoco IV* rule cannot stand for a second and independent reason: its requirement that unions must grant nonmembers the right to participate in the union's decisionmaking process is contrary to Congress' clearly-expressed intent.

Because *Amoco IV* cuts deeply into the association freedom of union members by forcing the members to give a formal vote in their group's affairs to persons who do not elect to join the group and assume the responsibilities of membership—and because granting nonmembers that right runs contrary to the long history of union decisionmaking by union members on all matters, including decisions concerning affiliations—it would take the clearest evidence of congressional intent to conclude that the NLRA, as the Act has been amended, is a grant to the Board of the authority to force nonmember voting in union referenda. The legislative history of both the Labor Management Relations Act of 1947 and the Labor-Management Reporting and Disclosure Act of 1959 demonstrates that Congress had no such intent. Part II(A), pp. 36-38, *infra*.

The history of those Acts show: first, that Congress was well aware of the fact that all employees in a represented bargaining unit are not necessarily members of the union that acts as the bargaining representative or even eligible for membership, and that only those who are members of the union participate in making its decisions; second, that Congress decided not to disturb the right of labor unions to prescribe membership eligibility requirements; third, that Congress debated at length the question of how extensive federal regulation of union internal affairs should be and decided not to regulate the procedures by which unions effectuate constitutional changes generally and affiliations and mergers particularly; and fourth, that despite the disagreements over the appropriate extent of regulation, it was common ground throughout the debates that federal regulation should grant voting rights only to union members, and not to nonmembers, because a union "rightfully belong[s]" to its members. Part II(B), (C), pp. 38-47, *infra*. The rule of *Amoco IV* is contrary to these congressional judgments.

There is one further respect in which *Amoco IV* is inconsistent with congressional intent: that decision starts from a fundamental misconception of the role of the Labor Board as Congress delineated that role. Specifically, in enacting the LMRDA, Congress considered proposals to require compliance with the rules being legislated in that law as a condition of a union being certified by the Labor Board as bargaining representative or of being permitted to file unfair labor practice charges. Congress rejected such proposals because the legislature concluded that to adopt such a means of enforcing rules concerning union decisionmaking procedures would be "ineffective in the case of strong unions"; "unfair to the members who have done no wrong but who would suffer . . . the loss of NLRB protection"; and "result in a frustration of the principal purpose of the Labor Management Relations Act, that is, settlement of labor disputes in an orderly, efficient and expeditious manner." Thus, in conditioning an affiliated union's right to obtain a bargaining order from the Labor Board on the manner in which the union made its affiliation decision, the Board has entered a realm Congress specifically decided the Board should not enter and has used its power over representation matters in a way Congress specifically decided those powers should not be used. Part II(C), pp. 47-48, *infra*.

ARGUMENT

I. THE BOARD HAS FAILED TO ARTICULATE A RATIONAL BASIS FOR COMPELLING UNIONS TO GRANT NON-MEMBERS THE RIGHT TO PARTICIPATE IN THE UNION'S AFFILIATION DECISION-MAKING PROCESS

A. Decisions of the National Labor Relations Board, like those of other administrative agencies, are "judicially reviewable for consistency with the [governing] Act, and for rationality." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978). The rationality standard, while a deferential one, is, as this Court has recently reaffirmed, far from toothless:

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transp. Inc. v. Arkansas-Best Freight System, supra*, [419 U.S.] at 285; *Citizens to Preserve Overton Park v. Volpe, supra*, [401 U.S.] at 416. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). [*Motor Vehicle Mfrs. Ass'n. v. State Farm Mut.*, 463 U.S. 29, 43 (1983).]

The basic requirement of reasoned decisionmaking applies no less where an agency has broad decisionmaking authority under the governing statute than where that authority is more narrowly constricted. *See, e.g., State Farm, supra* (decision under general delegation to promulgate safety standards); *Atchison, T. & S.F. RR. Co. v. Wichita Bd. of Trade*, 412 U.S. 800 (1973) (ratemaking decision); *Labor Board v. Metropolitan Ins. Co.*, 380 U.S. 438 (1965) (decision under authority to establish appropriate bargaining units); *see also First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (reversing NLRB determination that partial closings are a mandatory subject of bargaining, after recognizing, *id.* at 675 & n. 14, that Congress "deliberately left" the general statutory words "without further definition" so that the Board would have "the power to define those terms in light of specific industrial practices"). And as the last two cited cases show, this Court has not hesitated to overturn Board decisions that are inconsistent with the Agency's statutory mandate.[6]

There are two reasons why, in this case, particular care is in order in assuring that the Board has met its decisionmaking responsibilities.

First, this is a situation in which the agency has chosen radically to alter a rule that was settled for many years. While "regulatory agencies do not establish rules of conduct to last forever," *State Farm*, 463 U.S. at 42, *quoting American Trucking Assns. Inc. v. Atchison, T. & S.F. R. Co.*, 387 U.S. 397, 416 (1967), nonetheless:

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[6] For recent examples, *see NLRB v. Longshoremen*, —— U.S. ——, 53 L.W. 4919 (June 27, 1985); *NLRB v. Bildisco & Bildisco*, —— U.S. ——, 52 L.W. 4270 (Feb. 22, 1984); *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983); *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *NLRB v. Longshoremen*, 447 U.S. 490 (1980); *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *NLRB v. Baptist Hospital Inc.*, 442 U.S. 773 (1979); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Detroit Edison Co. v. NLRB*, 440 U.S. 201 (1979).

> A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T. & S.F. R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973). *Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis beyond that which may be required when an agency does not act in the first instance.* [*State Farm*, 463 U.S. at 41-42 (emphasis added)].[7]

Second, this is a situation in which it is the Board's very authority to act in a particular area that is at issue. The Board maintains that the NLRA empowers the Agency to regulate union procedures for deciding affiliation questions; it is our position that the Board has no such power. Precisely because, if the Board is correct, the particular regulations concerning the entire process by which unions make affiliation decisions thereafter adopted by the Board will be entitled to considerable deference, the Board should be required to provide a convincing justification for its threshold claim of authority in this area. "An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946). Thus, as the Court stated in *Labor Board v. Insuarnce Agents*, 361 U.S. 477, 499 (1960), "[W]here Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; *but they must be sure the question has been asked.*" (Emphasis added.)

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[7] While *State Farm* and *Wichita Bd. of Trade* were both rulemaking cases, there is no apparent reason why "sharp changes of agency course [should not] constitute danger signals to which a reviewing court must be alert," *State Farm v. Department of Transportation*, 680 F.2d 206, 220 (D.C. Cir. 1982), *aff'd. in part, State Farm, supra*, when agency decisionmaking through adjudication is involved. *See* Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163 (1985).

This Court's recognition that "[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board," *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266 (1975), does not diminish the Court's authority to finally decide whether the Board has overstepped the limits of its statutory power here. In contrast to the situation in *Weingarten*, *see id.* at 265, n. 10, the Board has never sought to justify its change of position at issue here by pointing to new industrial or technological developments. Moreover, union affiliations and mergers have been common since the earliest days of the Act,[8] and the Board has nowhere suggested that the legal issues raised by such union decisions as to the best organizational mode for pursuing their goals have changed in any way in recent years. Rather what has occurred is that, in a five-year period, as the composition of the Board has changed, the Board has gone back and forth on the issue posed here with the result that the issue happens to come to this Court after a 3-2 majority adopted the Board's present position in place of the opposite position the Agency had originally taken in this very case. For all these reasons this is a case in which the Board's claim to deference is at its weakest.

B. In order to evaluate the rationality of the Board's *Amoco IV* rule, it is necessary first to place that rule in its legal context.

Section 9(c) of the Act, 29 U.S.C. § 159(c), empowers the NLRB to determine whether a "question of representation affecting commerce exists," and if so to ascertain the answer to that question by holding "an election by secret ballot" in which all the eligible employees in the relevant "unit appropriate for the purposes of collective bargaining" may register their preference for or against representation. Section 9(a), 29 U.S.C. § 159(a), in

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[8] Note, *Union Affiliations and Collective Bargaining*, 128 U.Pa. L.Rev. 430, 445 *et seq.* (1979); Leisersen & Slichter, *American Trade Union Democracy*, 93 *et seq.* (1959); *see generally* Chitayat, *Trade Union Mergers and Labor Conglomerates* (1979).

turn, provides that if the employees do favor representation, their chosen representative shall be the "exclusive [bargaining] representative of all the [unit] employees." And § 8(a)(5), 29 U.S.C. § 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the [§ 9(a)] representative of his employees."

Since its earliest days, the Labor Board has followed two rules, both clearly stated in the Board's brief, for applying these general principles in the context of a change in the organizational structure of a union that is serving as an exclusive bargaining representative.

First, "the Board holds that organizational changes that are *substantial enough to create an entirely different entity* raise a statutory question concerning representation which can only be determined through the Board's formal election procedures." NLRB Br. at 16 (emphasis added); *see id.* at 27-31. In those procedures, the question put to the employees in the bargaining unit—all of whom have the right to vote—is whether those employees desire to be represented by the new entity or not to be represented at all.

Second, organizational change that is *not* "substantial enough to create an entirely different entity" is "not sufficient to destroy continuity and thus raise a question concerning representation." NLRB Br. at 16-17. *See also* pp. 19-24 *infra*. In such cases, as in all others in which a bargaining representative has been selected, the employer is obligated to continue to recognize and bargain with the (reorganized) union unless and until either the union loses majority support, or the employer comes to entertain a "good faith and reasonably-grounded doubt" based on "objective considerations" that the union lacks majority support.[10] The critical point is that the union reorganization is not sufficient, in and of itself, to

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[10] *Terrell Machine Co.*, 173 NLRB 1480, 1481 (1964), *enf'd*, 427 F.2d 1088 (4th Cir. 1970); *see also, e.g., Celanese Corp.*, 95 NLRB 664, 672 (1951); *Burger Pits*, 273 NLRB No. 127 (1984).

create such doubt, excuse the employer from his bargaining obligation, or otherwise raise a question of representation.

Amoco IV does not purport to change either of these rules. Rather, what *Amoco IV* holds is that "where the change [the bargaining representative] has undergone is *not* sufficient to destroy continuity and thus raise a question concerning representation," NLRB Br. at 16-17 (emphasis added), the Board is nonetheless empowered to compel the union to grant employees in the bargaining unit who have *not* joined the union the right to vote in a union-conducted election on whether the union to which those employees do not belong should affiliate with some other entity. As we proceed to show, the rationale offered by the Board for this rule is at war with the rationale of the other two rules which together comprise the Board's "continuity doctrine," and the Board law based on these conflicting rules does not meet the test of rationality.

1. *The Continuity Doctrine And Affiliation Decisions*— From the beginning, the Labor Board "has in general found that affiliations do not destroy continuity of representation," NLRB Br. at 16 n. 10, and has therefore held that affiliations do not pose a question of representation.[11] This doctrine rests on a two-part rationale.

First, the Board has recognized that a change in a union's affiliation status does not ordinarily destroy the identity of that union and thus does not ordinarily vitiate the force of the original employee selection of the union as the bargaining representative for the unit. The point is first made in *American-Hawaiian Steamship Co.*, 10 NLRB 1355, 1366 (1939), where the Board, in requiring employers to continue to bargain with a local which had left the International Longshoremen's

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[11] This rule was first stated in *Newark Rivet Works*, 9 NLRB 498 (1938) and most recently reaffirmed in *Insulfab Plastics Inc.*, 274 NLRB No. 126 (March 11, 1985). We trace the evolution of the doctrine at pp. 24-28 *infra*.

Association, AFL, and had affiliated with the International Longshoremen's and Warehousemen's Union, CIO, stated: "The Union certified by us did not cease to exist" and therefore the employers "at all times after the certification were under a duty, upon request, to bargain collectively with the Union." Most recently, in finding that the affiliation of an independent union with an international did not result in a change in the bargaining representative, the Board explained: "The Independent after affiliation remains the same small platoon it always was but it now can arrive at the bargaining table with newly-acquired reinforcements." *Insulfab Plastics, Inc.*, 274 NLRB No. 126, ALJ slip op. at 15 (March 11, 1985).

To be sure, as the Board has noted, a change in affiliation may result in a "new contract of association" for the union or in other similar changes. *Harris-Woodson Co.*, 85 NLRB 1215, 1217 (1949), *enf'd*, 179 F.2d 720 (4th Cir. 1950). But such changes—like amendments to a union's constitution—do not affect the continued *identity* of the union. As Chief Judge Parker stated in *Harris-Woodson*:

> Metaphysical arguments as to the nature of the entity with which we are dealing should not be permitted to obscure the substance of what has been done or to furnish a smoke screen behind which the company may with impunity defy the requirements of the statute that it bargain with the representative that its employees have chosen. The identity of that representative, composed entirely of the company's employees, was not changed either by its change of name or its change of affiliation. [179 F.2d at 723.]

The Board has therefore continually "regard[ed] . . . 'continuity of organization' as the governing test in determining whether one labor organization is identical with another having a different name and affiliation." 85 NLRB at 1217. *See also, e.g., Cochran Co.*, 112 NLRB 1400, 1408 (1955).[12]

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[12] The paradox that organic entities—a man going through childhood, maturity and old age or a flowing river—stay the same

The second component of the continuity doctrine's rationale is the Board's consistent recognition that, as a general matter, the fact that a union has affiliated with some other entity "has no probative value concerning the employees' choice of the [union] as their collective bargaining representative." *American Range Lines, Inc.*, 13 NLRB 139, 154 (1939). The reason why this is so warrants some elaboration.

When employees are called upon to vote in a representation election, the question they are asked is not whether they desire representation from an organization whose specific attributes are fixed and guaranteed but rather whether they desire to be represented by an organization

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while changing is one that has fascinated philosophers from the pre-Socratic days on. And democratic organizations, which in their essence are systems for continuously effecting change through orderly processes, are organic entities in this sense.

The United States of America, for example, has not lost its identity through its westward expansion, the sweeping changes brought about by industrialization and the Federal Government's response, or through the new role the United States has assumed in world and regional organizations. No one suggests, therefore, that the original consent of the governed that was obtained when the Constitution was ratified in 1789 needs to be resecured in light of these changes.

It would make little more sense to suggest that a union that does not reconfigure itself but that does evolve over time—as all organic bodies do—should be required to resecure the consent of the bargaining unit employees to be their representative. It is not surprising, therefore, that virtually all of the cases in which the Board has found that a union transfiguration poses a representation question were instanecs of schism, *viz.*, instances in which a division occurred within the preexisting bargaining representative and competing claims were made as to which entity is the "true" rep-representative. *See, e.g., Brewster Aeronautical Corp.*, 14 NLRB 1024 (1939); *Brightwater Paper Co.*, 54 NLRB 1102 (1944); *Hershey Chocolate Corp.*, 121 NLRB 901 (1958). *But cf. Foote Brothers Gear Machinery Corp.*, 14 NLRB 1045 (1939), *enf. denied*, 114 F.2d 611 (7th Cir. 1940) (no continuity where charter of the preexisting union revoked and no clear line of succession to the union claiming bargaining rights).

which, like any other democratic organization, will be engaged in an ongoing process of evolution in accordance with the desires of the membership. The world will not stand still; times change and circumstances change. As a consequence of the restless flow of events, during a union's tenure as bargaining representative, new leadership may (and usually will) be elected; new policies, new programs and new philosophies may (and usually will) be pursued; the union's constitution may (and usually will) be amended to establish new structures, new procedures and new means of furthering its goals; the union's size or jurisdiction may (and usually will) change (as new units are organized or existing units cease to exist or cease to be represented); and the union's membership will certainly turn over. What is *most* predictable—what is the only certainty—when employees are called upon to decide whether they desire to be represented by a bargaining representative is that the union for (or against) which the employees are voting will not be static but will be in a constant state of transformation.

Because that is so, the fact that a union, after selection as the bargaining representative, undergoes a change in its leadership, in its policies or in its structure has never been thought, in and of itself, to put in doubt the union's continued majority status.[13] Indeed, both as a

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[13] To justify an employer's refusal to bargain with a certified representative the Board has required actual evidence as to employee sentiment, and not some proxy such as proof of employee turnover, *e.g., National Plastic Products Co.*, 78 NLRB 699 (1948); *Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965), *enf. denied*, 359 F.2d 799 (7th Cir. 1966), or even proof that less than a majority of the unit are members of the union or are paying union dues, *e.g., Wald Transfer & Storage Co.*, 218 NLRB 592 (1975); *Terrell Machine Co.*, 173 NLRB 1480 (1969), *enf'd*, 427 F.2d 1088 (4th Cir. 1970). Indeed, even the filing of a representation petition by a rival union, *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982), or of a decertification petition, *Dresser Industries*, 264 NLRB 1088 (1982), is not sufficient to provide a "good faith doubt" of the incumbent union's majority status (unless, of course, the peti-

matter of experience and logic, the *lack* of union change in the face of change all around is at least as likely to jeopardize employee support as is the process of evolution. And in this regard, an affiliation is no different than the host of other changes a union may undergo. Simply stated, there is neither any empirical evidence for the view, nor any logical basis for the belief, that an affiliation is more likely to threaten a union's continued majority status than, *e.g.*, a change in leadership or an increase in dues.

Nor, is there any reason for engaging in abstract speculation as to when change or the lack of change may erode majority support. If, in a particular case a change in the union, such as an affiliation, does lead to the union's loss of majority support, the Board's processes provide a fully adequate means of response. Specifically, under § 9(c), the employees in a bargaining unit who by reason of the change no longer wish representation may petition for a Board-conducted decertification election; if the Board finds that a "question of representation exists" a § 9 election will be held in which all employees in the unit may vote on whether they desire continued representation by the union.[14]

There is, therefore, no reason for treating an affiliation (or any other development in a bargaining representa-

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tion is signed by a majority of the bargaining-unit employees). *See also Bethlehem Steel Co.*, 86 NLRB 340, 364 (1950) ("the mere passage of time is not, in the absence of more concrete factors, a circumstances affecting the presumption [of continued majority support]").

[14] The Board has developed certain "bar" rules—"self-imposed and discretionary in application," *Avco Mfg. Corp.*, 106 NLRB 1104, 1105 (1953)—that generally preclude § 9 elections during specified periods of times such as during the life of a collective bargaining agreement, *e.g.*, *General Cable Corp.*, 139 NLRB 1123 (1962). Those rules are, however, relaxed where, as a result of the reconfiguration of a union, a genuine question of representation exists. *See, e.g.*, cases cited n.12 *supra*.

tive's ongoing evolution) as a *proxy* for a loss of support —as posing a representation question—since the Act provides a simple means for employees to raise such a question *directly*. Thus the continuity doctrine wisely refuses to *assume* that an affiliation *ipso facto* puts the union's support in doubt and thus refuses automatically to find a representation question in an affiliation.

The instant case well illustrates the soundness of the continuity doctrine in this regard. Seattle First's employees decided, in a representation election, that they desired representation by FIEA. The Union's constitution expressly authorized "affiliation with other labor organizations." Pursuant to that authority, by the vote of over 60% of the union members participating, FIEA became an affiliate of UFCW. After the affiliation, the organization continues to exist as a discrete entity with its own membership—employees of Seattle First—and its own officers and unit representatives. FIEA remains in charge of its own collective bargaining negatiations and the decision whether to strike remains with FIEA's membership. In short, the bargaining representative that the employees chose continues as their representative, and there is no reason to believe—and nothing in this record to suggest—that the representative has lost majority support by virtue of its decision to join hands with UFCW. In these circumstances, it makes all the sense in the world to hold, as the continuity doctrine does, that no question of representation is posed by the affiliation.

2. *Amoco IV and the "Due Process" Requirements*— As previously noted, notwithstanding the absence of a representation question, *Amoco IV* holds that the Board is empowered to compel unions to grant nonmembers the right to participate in the union's affiliation decision-making process. The Board in *Amoco IV* justified this rule as one of the "due process requirements which must be met in order to have a valid affiliation election." Pet. App. 53a. To evaluate the rationality of *Amoco IV*,

therefore, it is useful to step back and examine these "due process" requirements.[15]

In its early cases formulating the continuity doctrine, the Board sometimes referred to the manner in which an affiliation decision had been made. For example, in *Harris-Woodson Co., supra,*

> the Trial Examiner based his conclusion that the 2 unions are the same upon a finding that the membership of United consists of the same individuals that constituted the membership of Local 1274. Although the employees present at a membership meeting of Local 1274 voted unanimously to affiliate with the Textile Workers Union of America . . . only about 18 of a total membership of 23 were present at the meeting. . . . [T]he membership of the two groups is not identical. Even if this were true, it is not controlling in view of the fact that at least approximately three-fourths of the members of Local 1274 are members of United. . . . So far as appears . . . those employee members absent from the meeting have not split off from those who voted to affiliate . . . on that or any other question. [85 NLRB at 1216-17 & n.4.]

As the quotation shows, this procedural inquiry was *not* originally separate from the overall continuity inquiry, but simply part of determining whether factual support exists for a continuity conclusion: the Board reasoned that the fact that a majority of the union's members concurred in the affiliation tends to show that the mem-

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[15] As the Board's brief tacitly acknowledges, NLRB Br. at 20 n. 14, despite the Board's use of "due process" terminology there is no *constitutional* dimension to this case: the Board is not a roving constitutional commission entitled to impose norms not found in its governing statute, the NLRA; nor is an internal union election a procedure involving state action and thereby governed by the federal Constitution. *Cf. Finnegan v. Leu,* 456 U.S. 431 (1981); *Steelworkers v. Sadlowski,* 457 U.S. 102 (1982) (internal union decisions are not governed by the First Amendment but only by federal statutory provisions.)

bership of the two organizations is substantially the same, thereby supporting a determination that the bargaining representative remains the same. *See also, e.g., Emery Industries, Inc.*, 148 NLRB 51, 52-53 (1964). Proof of procedural regularity, therefore, was not, originally, either indispensable nor was that proof tested by a fixed set of Board guidelines reflecting the Agency's notions of "due process."

Specifically, the Board did not "always require[] reliable evidence of employee consent," as the NLRB now claims, *see* NLRB Br. at 19. For example, in *Newark Rivet Works*, 9 NLRB 498, 511 (1938), the Board "f[ou]nd little merit in [the employer's] contention that because the action of the executive committee in changing the national affiliation of the union was ratified by a vote of less than a majority of the union members, [the employer] was excused from bargaining with the [local]." And in *The East Ohio Gas Company*, 140 NLRB 1269, 1270 (1963), the Board declined to concern itself at any length with evidence concerning the affiliation election, because "in any event . . . the [union] maintained its identity as a separate entity with the same membership, officers and committees." *See also, e.g., Cadillac Automobile Co. of Boston*, 90 NLRB 460 (1950); *Retail Clerks v. N.L.R.B.*, 373 F.2d 655 (D.C. Cir. 1967); *Union Carbide and Carbon Corp. v. N.L.R.B.*, 244 F.2d 672 (6th Cir. 1957). And the Board has viewed other procedural issues arising in the course of a union's affiliation decision such as "whether or not the membership meeting is called in conformity with the Union's constitutional requirements . . . [as] *no concern of the Board* . . . [as long as] the affiliation . . . had no effect upon the structure, functions, or membership of the Local Union." *Waterway Terminals Corp.*, 120 NLRB 1788, 1789 (1958) (emphasis supplied). *See also R. C. Williams & Co.*, 107 NLRB, 933, 934 n.2 (1954).

As time went on, the Board began to develop a second, largely separate strand of affiliation cases. In these cases,

such as *Factory Services, Inc.*, 193 NLRB 722 (1971), *Rinker Materials Corp.*, 162 NLRB 1689 (1967), and *M. A. Norden Co.*, 159 NLRB 1730 (1966), the Board insisted upon evidence of employee consent because, given "the degree of change in the nature of the local," the "successor" local was "*not* a continuation of the old." *N.L.R.B. v. Commercial Letter, Inc.*, 496 F.2d 35, 41 (8th Cir. 1974) (emphasis supplied) (distinguishing cited cases and holding that where there *is* continuity of representation, "the changes [are] . . . primarily in the internal makeup of the union, [and] there is no requirement that prospective members be allowed to vote on them").

The Board cases just reviewed set out a coherent doctrine: general evidence of regularity in an affiliation election and of majority membership support, while not essential to a finding of continuity of representation, was nonetheless deemed relevant to such a finding. And where evidence of continuity was lacking, the Board might, in the central interest of industrial peace, nonetheless approve a transfer of bargaining rights if a union affiliation election had been conducted in a fashion substantially replicating Board procedures.

The rule of *Waterway Terminals, supra*—that the Board will *not* ordinarily concern itself in any detail with the internal regularity of an affiliation or other reconfiguration—began to give way, however, in two directions. First, it was suggested that even where there *is* continuity of representation, the Board might nonetheless disapprove a transfer of bargaining rights if there had been "substantial irregularity" in applying the union's constitution and bylaws during an affiliation or merger election. *Gate City Optical Co.*, 175 NLRB 1059, 1069 n.3 (1969). *See also Hamilton Tool Co.*, 190 NLRB 571, 574 n.8 (1971). Second, even where the Board found continuity of representation, the Agency began to impose its *own* standards on unions of what must be done in a

proper affiliation election. While this began as an effort simply to assure generally that "the change reflected a majority view" among union members, *North Electric Co.*, 165 NLRB 942, 942 (1967), the Board's role soon escalated, at the behest of employers, into a detailed inquiry into such matters as the protections for a secret ballot; the timing of the notice; the manner of holding the election; and the system for counting the ballots. *E.g.*, *Hamilton Tool Co.*, *supra*; *East Dayton Tool & Die Co.*, 190 NLRB 577 (1971); *J.H. Day Co.*, 204 NLRB 863 (1970); *Perco, Inc.*, 204 NLRB 1036 (1973).

Once the Board entered the realm of "due process" regulation of affiliation elections, the Agency was besieged by claims from employers that an affiliation election was invalid because limited to union members. In *North Electric Co.*, *supra*, the Board rejected such claims, and in *Amoco III*, *supra*, the Agency reaffirmed that ruling, stating that "affiliation vote procedures, including the voting status of non-members, are internal union matters." 239 NLRB at 1195. But in *Amoco IV* the Board overturned those holdings and adopted the rule at issue here: "[I]n order to provide adequate due process safeguards in an affiliation election, all unit employees, whether union members or not, must be permitted to participate and vote in an affiliation election." Pet. App. 54a.

3. *The Incompatability of the Continuity Doctrine and the Amoco IV Due Process Requirements*—As the foregoing review shows, the Board's "due process" requirements for affiliation elections developed almost accidentally. At no point did the Board engage in a reasoned discussion of its authority, or lack of authority, to create such requirements. It is not surprising, therefore, that the Board majority in *Amoco IV* was puzzled by the incongruity of the then-prevailing rule requiring "due process" in "internal union matters." Pet. App.. 53a.

Rather than recognizing that incongruity as the occasion for reexamining its "due process" rules, the Board majority in *Amoco IV* attempted, many years after its development, to rationalize those requirements and in so doing to extend their reach. But as we proceed to demonstrate, the explanation advanced by the Board majority for "due process" regulation cannot be reconciled with the Board's continuity doctrine.

(a) The principal justification offered in *Amoco IV* for "due process" regulation of union affiliation decisions, including extending the franchise to non-members, is that such decisions involve " 'the selection of a bargaining representative.' " Pet. App. 53a. The Board thus thought it "inconsistent to permit all unit employees to vote in a representation election but, when the question is one of affiliation with another union, to permit only union members the right to vote." *Id.* And on that ground the Board extended the franchise to non-members in affiliation votes to protect their "freedom to select a bargaining representative." *Id.* 55a n.12 (emphasis deleted).

This entire rationale is at war with the continuity doctrine. The premise that a union affiliation election involves "the selection of a bargaining representative" is contrary to the central teaching of that doctrine: an affiliation —like the other evolutionary changes unions continuously effect—does *not* ordinarily raise a question of representation because, in most cases, the union that has already been selected continues as the on-going bargaining representative. Indeed, the very fact that, under the continuity doctrine, a representation election *will* be required if there is a *discontinuity* in the bargaining representative demonstrates that a union affiliation election is entirely different from a Board representation election.[16] That being so, there is no inconsistency with § 9

[16] If a union affiliation election were tantamount to a representation election, it would necessarily follow that the election would be required to be conducted on a bargaining-unit by unit basis, with

principles in limiting voting in union affiliation elections to union members. And because a representation election will be required when an affiliation *does* implicate the selection of a bargaining representative, the Board is simply wrong in stating that a rule requiring nonmember voting in union affiliation elections is necessary to protect the nonmembers' "freedom to select a bargaining representative."

The illogic of the *Amoco IV* rule is highlighted by the difference in the questions posed in a representation election triggered by a union's affiliation decision and in the underlying affiliation election. In the representation election, the question put to the bargaining unit would be whether the employees desire to be represented by the affiliated entity or not at all; the affiliation would be a given, and those who disfavored the affiliation would have to decide whether, notwithstanding its consummation, they still desire union representation. In contrast, in the affiliation election, the participants decide whether they prefer the union to be affiliated with another entity or to be unaffiliated.

But, as the Board's rationale suggests and as we show in part II *infra*, the Act grants the entire corpus of employees in a bargaining unit the right to participate only in the selection of the bargaining representative and proceeds on the premise that the representative once selected is to be governed by its members. And the Board has failed to supply any justification for permitting non-

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the results in each unit determinative for that unit. But where a union represents more than one unit, that is a logical impossibility: the union as an entity either affiliates or does not affiliate, and the union cannot accommodate the conflicting views of differing units. Not surprisingly, the Board has rejected the proposition that affiliation votes must be conducted unit-by-unit. *See William B. Tanner Co.*, 212 NLRB 566 (1974). This further confirms that an affiliation election is not synonymous with a representation election.

members of a union to register their preference as to whether the union to which they do *not* belong should affiliate with some other entity when their statutory right to participate in the selection of the bargaining representative is in all events secure.

(b) In the brief to this Court, the Board's counsel propose an alternative justification for the *Amoco IV* rule. Relying on a single phrase in that opinion—"affiliation votes affect the interests of all employees," Pet. App. 53a—Board counsel argue as follows:

> Even where an affiliation does not result in sufficient changes in a union to create a completely new entity, such an organizational change can still significantly affect the union's representation of the bargaining unit. . . . The[] changes [resulting from affiliation] affect not only the internal relationship between the independent union and its members, but also the relationship between the independent union and all of the employees it represents in its capacity as statutory bargaining representative.
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> An affiliation thus necessarily has the potential for changing the relationship between the statutory representative and the represented employees.
>
> * * *
>
> [E]ven where the change is not substantial enough to create a new entity, a union organizational change —specifically a change in affiliation—has a sufficient potential for affecting the union's representation of the bargaining unit so that all of the employees in the unit have a legitimate interest in voting on the change. [NLRB Br. at 22-23, 26.]

This explanation proves so much as to end up proving nothing at all. There are all manner of union governance decisions that have the potential to "significantly affect the union's representation of the bargaining unit," and as to which all "employees in the unit" would in that sense have a "legitimate interest in voting." Without affiliating or merging, for example, a union can: ex-

pand its membership to include new units of employees, or new geographical areas; raise dues substantially and, where there is a union security agreement, thereby increase the financial obligation of nonmembers; completely alter the governance of the union by, for example, changing the number and type of officers or giving the officers or executive board more authority; or provide for a new manner of approving strikes or settlements by, for example, establishing or eliminating ratification votes. And aside from these structural changes, the "union's representation of the bargaining unit" can be significantly affected by the choice of the officers and by a host of other decisions that a union is continually called upon to make.

If the effect of a union's affiliation decision on nonmembers were sufficient to justify extending to them the franchise within the union on that issue, it would necessarily follow that nonmembers would likewise be entitled to vote on all of these other questions which equally can affect them. Yet plainly that is not the Board law; even *Amoco IV* recognizes that nonmembers are not entitled to participate in "strike votes, contract ratification votes, etc." Pet. App. 53a. *See also* pp. 36-47, *infra*.

Board counsel attempt to remedy this defect in their argument as follows: "unlike affiliation votes, the other matters do not call for the Board to put its imprimatur on the union's decision . . ." NLRB Br. at 23 n.18.[17] In this

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[17] *See also* NLRB Br. at 18 (Board power to order non-member voting derived from the fact that the union "seeks the aid of government to enforce [the affiliation] choice").

Counsel's distinction finds no support in the Board's *Amoco IV* decision; what the Board there stated was that

> Unlike strike votes, contract ratification votes, etc. . . . which the dissent would equate with affiliation votes, only the latter directly impacts upon matters within the breadth of the Act and results in an undermining of the Board's own election and certification procedures. [Pet. App. 53a.]

In other words, the *Board's* rationale for permitting non-members to vote only in union affiliation elections is that only those elections implicate "the Board's own [representation] election and certification

regard Board counsel stress the fact that in the wake of an affiliation, the Board may be requested to "amend[] the designation of the employees' bargaining representative." NLRB Br. at 18. But if the Board grants that request all that such an amendment would signify is that the union that was certified as the bargaining representative continues as an on-going entity under a different name. *See, e.g., Missouri Service Comm'n*, 87 NLRB 1142, 1143 n.3 (1949) (amendment "is not to be construed as a recertification"). And Board counsel conveniently overlook the fact that *Amoco IV* applies in terms even where there is *no* request for a certification amendment if the employer "raises the question of affiliation . . . as a defense to an 8(a)(5) charge." Pet. App. 53a.

What Board counsel fail to explain is why it is that the Board puts its "imprimatur on the union's [affiliation] decision" by ordering an employer to bargain with a bargaining representative that was initially selected by the majority of the employees in the bargaining unit and that (despite an affiliation) continues as an ongoing entity. Nor do Board counsel explain why ordering bargaining after an affiliation would place the Board's "imprimatur" on the affiliation decision, but ordering bargaining after a union election, a union constitutional amendment or any other union decision would not place the Board's imprimatur on these decisions.

Putting those failures aside, the nub of the matter is that an order requiring an employer to bargain with a particular union signifies nothing more than the Board's finding that the union was selected by the employees as their bargaining representative, that the union continues to exist, and that its majority status has not been placed in question. And that is precisely what the continuity doctrine teaches to be true ordinarily of a bargaining representative that affiliates with another entity. To

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procedures." We have already demonstrated, *supra* at pp. 29-31, that this rationale cannot withstand analysis.

view a bargaining order as going further—as placing an "imprimatur" on the affiliation decision—would establish a limitless doctrine that would allow the Board to impose all manner of requriements on unions in the guise of assuring the integrity of its bargaining orders.

It is precisely for this reason that the Board itself has long rejected this very view. For example, in *Alto Plastics Manufacturing Corp.*, 136 NLRB 850 (1962), the Board refused an employer's request to deny certification to a union that had won a representation election on the ground that the union was corrupt; the Board could "find no warrant in the statutory scheme to authorize such action," *id.* at 851, because "[i]t must be remembered that . . . the Board merely provides the machinery whereby the desires of the employees may be ascertained, and the employees may select a good labor organization, a bad labor organization, or no labor organization . . . ," *id.* at 851-852.[18] Thus the fact that, after an affiliation, the Board may be called upon to change the name on the certification of a bargaining representative or order bargaining where there is a continuity in representation does not itself justify the Board in regulating the union's decision-making processes with respect to the affiliation. Accordingly counsel's attempt to supply a justification for such regulation in cases where no representation question is posed—like the Board's own attempt—fails the test of rationality.

C. Our showing thus far establishes that the *Amoco IV* rule is irrational in the sense that the rule rests on mutually inconsistent premises. While that showing is

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[18] *See also, e.g., Burns Int'l Security Service, Inc.*, 250 NLRB 959, 963 (1981); *Carroll Contracting*, 247 NLRB 890, 891 (1980); *Whittlesea Checker Taxi, Inc.*, 237 NLRB 1038, 1039 (1978); *Handy Andy, Inc.*, 228 NLRB 447 (1977); *Hotel Properties, Inc.*, 194 NLRB 815 (1972); *Aspen Skiing Corp.*, 143 NLRB 707, 709 (1963); *William J. Burns Int'l. Detective Agency*, 138 NLRB 449, 451 (1962); *Hamilton Brothers, Inc.*, 133 NLRB 868 (1961).

dispositive with regard to what the Board has done, we would be derelict if we did not add that *Amoco IV* is irrational not only under the tests of simple logic, but in an even more profound way: the Board's decision is inconsistent with the NLRA's basic purposes.

The overall aim of the NLRA is, as the Act's preamble states, to "encourag[e] the practice and procedure of collective bargaining." As the legislative history of the Wagner Act shows—and as this Court's decisions confirm, *e.g. Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 236-37 (1938)—that aim is itself a means to a greater end: "the making of agreements which will stabilize employment conditions and promote fair working standards," 2 *Legislative History of the National Labor Relations Act of 1935*, at 2336 (Sen. Wagner).

To achieve that end requires "stability of bargaining relationships," *Machinists Local v. Labor Board*, 362 U.S. 411, 425 (1960); the collective bargaining system could not function if the parties were constantly uncertain of —or engaged in a struggle over—the continued existence of a bargaining relationship. It is indeed in part in recognition that the "industrial stability sought by the Act would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship," *State Farm Mutual Auto. Ins. Co.*, 225 NLRB 966, 967 (1976), that the Board has held that reconfigurations of a bargaining representative do not ordinarily pose a question of representation.

The *Amoco IV* rule—and the due process doctrine generally—multiplies in a wholly-unthinking way the occasions for such unnecessary disruptions of industrial stability. That rule permits an employer to seize upon perceived (or pretended) defects in a union's procedures for affecting an organizational change to cease recognizing and bargaining with that union even though the union is a continuation (albeit in reorganized form) of the or-

ganization the employees chose as their bargaining representative; the employees have not themselves sought to oust the union as their representative; and the employer does not even have a good faith doubt based on objective considerations that the union lacks majority support. This rule thus destabilizes bargaining relationships by "allow[ing] employers to rely on employees' rights in refusing to bargain with the formally designated union," *Brooks v. Labor Board*, 348 U.S. 96, 103 (1954); allowing employers to do so, as this Court has recognized, "is not conducive to th[e] end [of industrial peace], it is inimical to it," *id.*

II. THE AMOCO IV RULE IS CONTRARY TO CONGRESS' CLEARLY EXPRESSED INTENT TO VEST CONTROL OF UNION DECISIONMAKING IN THE UNION'S MEMBERS AND TO DENY THE LABOR BOARD A ROLE IN REGULATING THE PROCESS OF UNION DECISIONMAKING

There is a second and independent reason why the *Amoco IV* rule cannot stand: its requirement that unions must grant nonmembers the right to participate in the union's decisionmaking processes is contrary to Congress' clearly-expressed intent to regulate those union processes to a limited extent; to vest control of those processes in the union's members; and to deny the Labor Board a role in regulating those processes.

A. Before turning to the federal labor laws and their legislative history, we begin by noting that *Amoco IV* cuts deeply into the associational freedom of union members. Heretofore, the members of a union have been free to decide on the direction and shape of their organization on their own. We are aware of no union constitution that at any time has granted voting rights to non-members in union decisionmaking; the uniform practice, so far as we can determine, has been precisely the opposite. And this has always been true of union decisionmaking with respect

to whether to ajliate with a national or international union. (That type of decision, it should be noted, was quite common to 1935 when the NLRA was first enacted and in 1947 when the NLRA was amended by the Labor Management Relations Act, 61 Stat. 136, ("LMRA"), a period in which national unions affiliated with two rival labor federations (the American Federation of Labor on the one hand and Congress of Industrial Organizations on the other) competed vigorously with each other to woo local unions from one body to the other.[19])

The union members' decisions have, of course, always been subject to the test of a Board representation election called to decide whether the bargaining unit employees as a whole still desire to be represented by the union (as the union had evolved). But nonmembers have not had the right to stand aloof from the union and still participate in the union's own processes for determining how the union would evolve; those processes have been reserved for those who elect to join the union and whom the union elects to accept into membership.

This right of union members to control their organization lies at the heart of their freedom of association; that freedom "necessarily presupposes the freedom to identify the people who constitute the association *and to limit the association to those people only.*" *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981) (emphasis added).[20] A "regulation that forces the group to accept

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[19] See n.8 *supra*; *see generally* W. Galenson, *The CIO Challenge to the AFL* (1960).

[20] At issue in *Democratic Party* was a state law analogous to the *Amoco IV* rule: a law requiring political parties to allow persons not affiliated with the party to participate in the process by which the party nominated its presidential candidates; the Court held that law unconstitutional. *Cf. Rosario v. Rockefeller*, 410 U.S. 752 (1973) (sustaining state law establishing a durational affiliation requirement for voting in a primary election).

members it does not desire" thus is a "clear[] example of an intrusion into the internal structure or affairs of an association." *Roberts* v. *United States Jaycees*, —— U.S. ——, 52 L.W. 5076, 5080 (July 3, 1984). And a regulation that forces a group to give a formal vote in the group's affairs, which is one of the privileges of membership, to persons who elect not to join the group (and assume the responsibilities of membership) is an ever clearer example of such an intrusion.

None of this is meant to suggest that Congress could not have empowered the Labor Board to compel unions to grant nonmembers voting rights if Congress had concluded that compelling interests so warranted. But given the long history of, and fundamental values supporting, the principle of union decisionmaking by union members—history and values of which Congress was fully aware—it would take the clearest evidence of congressional intent to conclude that the NLRA, as the Act has been amended, is a grant to the Board of the authority to force nonmember voting in union referenda. And, as we proceed to show, the legislative history of the federal labor laws, far from supporting that conclusion, demonstrates that Congress had no such intent.

B. (1) The 1947 LMRA contains the first set of federal statutory rules addressed to what unions may and may not do. In adopting that law, Congress was well aware of the fact that all employees in a represented bargaining unit are not necessarily members of—or even eligible for membership in—the union that acts as the bargaining representative; indeed, that fact formed the predicate for the extensive congressional consideration in 1947 on whether to permit unions to negotiate collective bargaining agreements that require employees, as a condition of employment, to maintain membership in the union that serves as bargaining representative.[21]

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[21] *See, e.g.*, H.R. Rep. 245, 80th Cong. 1st Sess. at 29, 33-34 (majority report) 79-82 (minority report) (1947); S. Rep. 105,

The solution Congress ultimately arrived at in the LMRA was: to leave unions free to establish eligibility rules for the union membership so that not all bargaining unit employees necessarily would be union members; to permit unions to negotiate union security agreements that require employees to meet the financial obligations of membership, *see Labor Board v. General Motors*, 373 U.S. 734 (1963); but to prohibit an employer from discriminating against a nonmember and a union from causing such discrimination if the nonmember was discriminatorily denied union membership or if the individual's tender of dues was refused. This solution is embodied in §§ 8(a)(3), (b)(1) & 8(b)(2) of the Act, 29 U.S.C. §§ 158(a)(1), (b)(1)(A), (b)(2). Senator Taft, the principal sponsor of the Senate bill, explained that under the bill:

> The union could refuse [an employee] admission to the union or expel him from the union; but if he were willing to enter the union and pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him. [2 Legislative History of the Labor Management Relations Act of 1947 at 1142 (GPO 1498) ("LMRA LegHist.")] [22]

Part 1, 80th Cong., 1st Sess. at 5-7, 20, 21-22 (majority report), (1947); S. Rep: No. 105, Part 2, 80th Cong. 1st Sess. at 8-10 (minority report).

[22] Congress as an integral part of this complex of provisions did, of course, enact § 8(b)(1)(A), 29 U.S.C. § 188(b)(1)(A), which makes it unlawful for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7." That section, as this Court has held, provides that a union's decisions are subject to NLRB scrutiny to determine whether those decisions abridge a § 7 right. *See, e.g., Scofield v. NLRB*, 394 U.S. 423, 429 (1969) (test is whether a union rule "frustrates an overriding policy of the labor laws"); *Pattern Makers v. NLRB*, —— U.S. ——, 53 L.W. 4928 (June 27, 1985). But nothing in the LMRA, in the Act's legislative history or in this Court's decisions provides any support for the notion that § 7 grants employees who are not union members a right to participate in the union's decisionmaking processes.

Congress also was aware in 1947 that once a union is selected as a bargaining representative, all of its decisions are made solely by its members, and not by nonmembers, but Congress manifested no dissatisfaction with that state of affairs. To the contrary, while the House of Representatives concluded that "[h]aving given to unions great power over workers" Congress should "make sure that the unions will operate democratically," H.R. Rep. No. 245, 80th Cong., 1st Sess. at 31 (1947), *reprinted in* 2 LMRA Leg. Hist. at 322, the provision of the House bill drafted to achieve that end was "a bill of rights for *union members*," *id.*, to be enforced through the Labor Board. *See* H.R. 3020, § 8(c), 80th Cong., 1st Sess., 1 LMRA Leg. Hist. at 179-83. And even that provision, which would have regulated union procedures for electing officers, increasing dues, imposing discipline and deciding to strike, would not have applied at all to decisions relating to changes in organizational structure.

Eventually, the House's bill of rights was deleted from the final legislation because, in Senator Taft's words, "[t]he Senate conferees refused to agree to inclusion of this subsection in the conference agreement since they felt that it was unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions as this section contemplated without further study of the structure of unions." 2 LMRA Leg. Hist. at 1540. Nonetheless the consideration given to a "bill of rights" in 1947 is significant here because its provisions reveal that those most supportive of regulating union decisionmaking at that time sought to do so in a manner that provided union members federally guaranteed rights to control certain decisions of their organization and because the 1947 proposal reveals that even the proponents of such regulation did not deem it appropriate to establish federal rules to govern affiliation decisions.

(2) In 1959, Congress enacted the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401 *et seq.*,

("LMRDA") which established regulation of the type that had been considered but not enacted in 1947; the LMRDA thus was "the first comprehensive regulation by Congress of the conduct of internal union affairs," *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193 (1967). Even this "comprehensive regulation" did not purport to address the processes by which unions decide whether to reconfigure themselves; Congress left those processes to be worked out through union self government. And nothing in the LMRDA grants employees who are not union members any right to participate in the life of the union in any respect at all.

In enacting the LMRDA, the 1959 Congress took as a given—as had the 1947 Congress—the right of labor unions to prescribe membership eligibility requirements; Representative Landrum stated, "We do not seek in this legislation, in no way, no shape, no guise, to tell the labor unions of this country whom they shall admit to their unions. No part of this legislation attempts to do that." 2 LMRDA Leg. Hist. at 1649 (NLRB ed.).[23] *See also id.* (Rep. Griffin) (the bill "does not touch or deal in any way with the admission to, or retention of, membership in a union). Moreover, Congress also took it as a given that rights should be extended only to union members and not to nonmembers; Congress' "overriding objective [in the LMRDA] was to ensure that unions would be democratically governed, *and responsive to the will of the union membership. . .*" *Finnegan v. Leu*, *supra*, 456 U.S. at 441 (emphasis added), and that "union members and not outsiders control the affairs of the unions." *Steelworkers v. Sadlowski*, *supra*, 457 U.S. at 116.

That theory permeates the various provisions of the LMRDA. For example, Title I of the Act—which is entitled "Bill of Rights of *Members* of Labor Organiza-

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[23] The Legislative History of the Labor Management Reporting and Disclosure Act of 1959 (NLRB ed.) is referred to throughout as "LMRDA Leg. Hist.".

tions—grants a series of rights to union members, including the following:

> Sec. 101(a)(1)—Every *member of a labor organization* shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberating and voting upon the business of such meetings . . .
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> Sec. 101(a)(2)—*Every member of any labor organization* shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting . . . [29 U.S.C. § 411(a)(1), (a)(2) (emphasis added).]

Senator McClellan, the author of the original version of Title I, explained that his purpose was to "plac[e] the ultimate power in the hands of the members, where it rightfully belongs, so that they may be ruled by their free consent. . . . The union must be returned to their members, to whom they rightfully belong." 2 LMRDA Leg. Hist. at 1099. Senator McClellan added:

> If we want fewer laws—and want to need fewer laws providing regulation in this field—we should start with the basic things. We should give union members their inherent constitutional rights, and we should make those rights apply to union membership as well as to other affairs of life. We should protect the union members in those rights. By so doing we will be giving them the tools they can use themselves. That is all I propose to do by this amendment. [2 *id.* 1103.]

Similarly, Title IV of the Act, which regulates union elections, grants rights only to union members. That Title requires unions to conduct elections "*among the members in good standing*," provides that in such elections "*every member in good standing* shall be eligible to be a candi-

date and to hold office (subject . . . to reasonable qualifications uniformly imposed)," and states that "each *member in good standing* shall be entitled to one vote." LMRDA § 401(a), (b), (e), 29 U.S.C. § 481(a), (b), (e). The Senate Labor Committee, which authored this Title of the bill, stated its rationale as follows:

> It needs no argument to demonstrate the importance of free and democratic union elections . . . The responsiveness of union officers *to the will of the members* depends upon the frequency of elections and an honest count of the ballots. [S. Rep. No. 187, 86th Cong., 1st Sess. at 20 (1959), *reprinted in* 1 LMRDA Leg. Hist. at 416 (emphasis added).]

What was in controversy in 1958-59, when the LMRDA was being developed, was how extensively to regulate unions; the precise reach of that Act is the result of careful congressional consideration in which all sides in the debate shared the view that whatever regulation was enacted should be so crafted as to grant rights to union members only and not to nonmembers.

The most pertinent examples here are the proposals that would have gone beyond the requirements concerning the approval of dues increases and the election of officers stated in § 101(a) and in Title IV to create a more general set of federal rules governing changes in union rules. For example, when the Kennedy-Ives bill, S. 3974 85th Cong., 2nd Sess., the precursor to the LMRDA, was before the Senate in 1958, Senator Knowland proposed an amendment that would have required unions to establish an initiative and referendum process with respect to proposals to amend the union's constitution or to recall a union officer, 104 Cong. Rec. 11184; that amendment was defeated because the majority concluded that "[w]e ought not to undertake to dot every 'i' and cross the very last 't' for labor unions, *id.* at 11190 (Sen. Ervin). But despite the disagreement over the desirability of the Knowland amendment, it was com-

mon ground in the debate that only union members' rights were implicated by the proposal. Thus, the Knowland amendment would have required referenda "at which each member of [the] labor organization . . . shall be entitled to vote by secret ballot," *id.* at 11184; Senator Knowland explained that his purpose was to "provide[] that union members will have an opportunity to change or modify the constitution of their organization, so as to be sure they have control over those who really exercise the power" because "[t]here can be no disagreement that a union should be governed and directed according to the wishes of the majority of its members," *id.* at 11186, 11187. And opponents of the Knowland amendment argued against it on the ground that "sufficient protection [would be] provided union members in respect of their officers" by virtue of the election regulations, *id.* at 11190 (Sen. Ervin) and that "[i]f the members of a labor union decide to do without a law to change the constitution and bylaws they can do it," *id.* at 11194 (Sen. Purtell).[24]

Similarly, in 1959, Senator McClellan's bill, S. 1137, 86th Cong., 1st Sess., would have established more extensive regulation of union governance than that which ultimately was adopted in Title I, including, of particular note here, regulation of the procedures for effecting certain types of affiliations and mergers. Senator McClellan explained that the purpose of his bill was to "bring to the conduct of union affairs *and to union members* the reality of some of the freedom . . . that we enjoy as citizens by virtue of the Constitution of the United

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[24] Senator Knowland introduced a second amendment to the Kennedy-Ives bill which would have mandated that certain collective bargaining agreements be "ratified by a majority vote *of the members of the labor organization* in the unit covered by the contract," 104 Cong. Rec. at 11461; that amendment was defeated as unduly intrusive into union affairs and thus inconsistent with the principle of "giving the unions the right to govern themselves, under the broad safeguarding provisions" of the bill, *id.* at 11462 (Sen. Morse).

States." 2 LMRDA Leg. Hist. at 1098. In accordance with that purpose, the McClellan bill extended rights to union members alone; for example, the provision of that bill that would have applied to votes on certain affiliations provided as follows:

> Sec. 102.—The constitution and bylaws or other governing charter of every labor organization shall contain provisions effectively designed to carry out the following objectives *and to guarantee to its members the following rights*:
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> * * *
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> (5) AFFILIATED ORGANIZATIONS—No organization or fund, whether or not incorporated, shall be created or financed by the funds of a labor organization except by the general vote of the labor organization. . . [1 LMRDA Leg. Hist. at 271-72.]

And the McClellan bill provision on mergers likewise provided:

> Sec. 103.—The constitution and bylaws or other governing charter of every local labor organization shall contain provisions effectively designed to carry out the following objectives *and to guarantee to its members* the following rights:
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> * * *
>
> (4) MERGERS OF LOCALS OR TRANSFER OF MEMBERSHIP OR FUNDS.—No merger of a local labor organization with any other local labor organization, and no transfer of membership or funds from one local labor organization to another shall take place except after approval by a general vote of each local labor organization (in the case of a merger), each local labor organization affected (in the case of a transfer of membership), and the local labor organization from which funds are to be transferred (in the case of a transfer of funds), upon due notice stating in detail the purpose of the merger or transfer. [1 LMRDA Leg. Hist. 276-77.]

Senator McClellan ultimately decided not to include these provisions in the "Bill of Rights" he proposed and which was adopted on the Senate floor. *See* 2 *id.* 1102.

C. This legislative history is significant for two reasons. First, it proves that the fact that the LMRDA does not regulate the procedures by which unions effectuate constitutional changes generally and affiliations and mergers particularly is the result of a carefully considered congressional decision concerning the appropriate reach of federal regulation of union decisionmaking. The Board in *Amoco IV* has thus decided to regulate processes Congress decided to leave unregulated by federal law.

Second, the LMRDA legislative history shows that the *Amoco IV* rule runs against the grain of the entire system of labor relations as established by the LMRA and the LMRDA. Under that system, while all employees have the right to participate in *choosing* a representative, representation rights at that point are vested only in the prevailing majority, thus limiting the right to govern the representative to those who choose to become full union members.[25] "Union membership allows the member a part in choosing [the union's] course of action," *Allis-Chalmers*, 388 U.S. at 191; "nonunion employees have no voice in the affairs of the union," *id.*[26] As the Board's counsel put it in oral argument just last Term, in urging

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[25] This principle reflects an accommodation of the principle of exclusive representation of all employees in the bargaining unit with the NLRA's policy of "voluntary unionism," *Pattern Makers v. NLRB, supra*, 53 L.W. at 4931.

[26] *See also Pattern Makers' League v. NLRB, supra*, 53 L.W. at 4931; *Brown v. Hotel & Restaurant Employees*, ——— U.S. ———, 52 L.W. 5042, 5048 n.3 (July 2, 1984) (White, J., dissenting ("a non-member employee in a bargaining representative often has no say in who will serve as officers of the union that represents him since such decisions are generally made by union members only").

this Court to sustain the Board's rule permitting union members to resign at will:

> [T]hough the Board adheres fast to the right of a member to leave the Union . . . the Court must remember that this is not a costless option. The Union continues to be the mandatory bargaining representative of that worker, *and in choosing to resign, he loses his voice* and he loses his voice most particularly in regard to the question of whether he may participate in a vote to take that unit out on strike, and he loses his voice in deciding whether to accept a new contract—a new contract to end the strike. [Tr. of Oral Argument in No. 83-1894, Feb. 27, 1985, pp. 38-39.]

That was precisely Congress' understanding and the rule of *Amoco IV* is contrary to that understanding.

D. There is one further respect in which *Amoco IV* is inconsistent with congressional intent: that decision starts from a fundamental misconception of the role of the Labor Board as Congress delineated that role.

At the time the LMRDA was debated, one of the central issues in contention was whether to give the Labor Board a role in enforcing the rules that were being developed by using denial of access to the Board as a sanction to enforce the LMRDA's commands. Under §§ 9(f)-(h) of the LMRA, in order for a union to be able to file a representation petition or an unfair labor practice charge with the Labor Board, the union was required to have filed a public report detailing, *inter alia*, its decisionmaking procedures, its receipts and disbursements, its dues structure, and the compensation of its officers, and disclaiming any affiliation with the Communist Party. During the course of the debates over the LMRDA, several proposals were made—including one by the Eisenhower Administration, *see* S. 748, 86th Cong., 1st Sess. §§ 202(c), 210(a), 1 LMRDA Leg. Hist. 95-96, 210-11—to extend that approach to require compliance with the

new requirements being legislated as a condition of access to the Labor Board.

In enacting the LMRDA, Congress rejected such proposals and provided for judicial enforcement of that Act either through private suits, *see* 29 U.S.C. § 412, or, in the case of Title IV, through suits filed by the Secretary of Labor, *id.* § 482. Indeed, in § 201(d) of the LMRDA Congress repealed §§ 9(f)-(h) of the LMRA. The Senate Committee explained why it viewed Labor Board sanctions as inappropriate to enforce the LMRDA:

> First, it would be ineffective in the case of strong unions not dependent upon NLRB facilities; second, it is unfair to the members who have done no wrong but who would suffer both the denial of information and the loss of NLRB protection; third, the rights and duties created by the National Labor Relations Act exist for the benefit of the public, and such legal obligations should be enforced equally in all cases, not traded off against one another as a system of rewards and punishments; and, finally, experience . . . clearly demonstrates that conditioning the use of the NLRB processes on compliance with not wholly related requirements . . . can result in a frustration of the principal purpose of the Labor Management Relations Act, that is, settlement of labor disputes in an orderly, efficient, and expeditious manner. In short, the committee is convinced that such a procedure is costly, cumbersome, and of doubtful efficacy. [S. Rep. No. 187, *supra*, at 9, 1 LMRDA Leg. Hist. at 405]

Thus, in conditioning an affiliated union's right to obtain a bargaining order from the Board on the manner in which the union made the decision to affiliate, the Board has entered a realm Congress specifically decided the Board should not enter and has used its powers over representation matters in a way Congress specifically decided those powers should not be used.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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